Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Neil R. Hirsch, M.D.,	)	DATE: June 2, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-95-001
	)	Decision No. CR379
The Inspector General.	)	
	)	

DECISION

By letter dated September 13, 1994, Neil R. Hirsch, M.D., the Petitioner herein, was notified by the Inspector General (I.G.), of the United States Department of Health & Human Services (HHS), that it had been decided to exclude Petitioner for a period of five years from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant, and Block Grants to States for Social Services programs.[1] The I.G.'s rationale was that exclusion, for at least five years, is mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act (Act) because Petitioner had been convicted of a criminal offense related to the delivery of an item or service under the Medicaid program.

Petitioner filed a timely request for review of the I.G.'s action. I set up a briefing schedule for the parties to address the issues in this case.

Because I have determined that there are no facts of decisional significance genuinely in dispute, and that the only matters to be decided are the legal implications of the undisputed facts, I have decided the case on the

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[1] In this decision, I refer to all programs from which Petitioner has been excluded, other than Medicare, as "Medicaid."

basis of the parties' written submissions.[2] I grant the I.G.'s motion for summary disposition.

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[2] The I.G. submitted a brief in support of her motion for summary disposition. Petitioner submitted a response brief and also, cross-moved for summary disposition. Following the submissions of these briefs, I ordered further briefing from the parties. See Order for Supplemental Briefing, dated March 20, 1995. The I.G. submitted a supplemental brief, to which Petitioner filed a supplemental brief in response.

The I.G. submitted eleven exhibits with her initial brief. Petitioner submitted three exhibits with his response brief. With her supplemental brief, the I.G. submitted two additional exhibits (I.G. Exhibits 12 and 13) and withdrew I.G. Exhibit 11. Petitioner did not submit any additional exhibits with his supplemental response brief.

Petitioner objected to the admission of I.G. Exs. 7, 12, and 13. I.G. Ex. 7 is the original indictment dated July 28, 1989, upon which criminal proceedings against Petitioner were initiated. This indictment was filed in the Superior Court of the State of Arizona. Petitioner has objected to this exhibit on the grounds that it is irrelevant and prejudicial because 14 counts of the 17-count indictment were later dismissed. The fact that this indictment was later amended does not mean that it cannot be a part of the administrative record before me. Petitioner has not questioned its authenticity. I overrule Petitioner's objection to I.G. Ex. 7 and admit it into evidence.

With respect to I.G. Exs. 12 and 13, Petitioner contends that their submission as exhibits has caused unfair surprise. P. Supp. Br. at 3-5. However, the I.G. submitted these exhibits in accordance with paragraph 5(a) of my March 20, 1995 Order, in which I gave the I.G. the opportunity to file any additional documentary evidence as exhibits in support of her supplemental brief. In paragraph 5(b), I gave Petitioner the same opportunity to submit additional documentary evidence with its supplemental response brief. I thus overrule Petitioner's objections to I.G. Exs. 12 and 13 and admit them into evidence. In addition to I.G. Exs. 7, 12, and 13, I admit also into evidence I.G. Exs. 1-6 and 8-10. I admit P. Exs. 1 - 3.

I affirm the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for a period of five years.

APPLICABLE LAW

Sections 1128(a)(1) and 1128(c)(3)(B) of the Act make it mandatory for any individual who has been convicted of a criminal offense related to the delivery of an item or service under the Medicare or Medicaid programs to be excluded from participation in such programs for a period of at least five years.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Arizona has in place a State plan approved under Title XIX of the Act. I.G. Exs. 12, 13.[3]

2. Under section 1115 of the Act, a State's experimental, pilot, or demonstration project which, in the Secretary's judgment, is likely to promote the objectives of Title XIX, may receive a waiver from the Secretary from compliance with any of the requirements of section 1902 of Title XIX to the extent necessary to enable the State to carry out its project. Act, section 1115(a).

3. If the Secretary grants a section 1115 waiver, the costs of the State's project which would not otherwise be included as expenditures under section 1903, and which

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[3] I cite the I.G.'s exhibits as "I.G. Ex(s). at (number)." I cite Petitioner's exhibits as "P. Ex(s). at (number)."

The parties' briefs and my findings of fact and conclusions of law will be cited as follows:

I.G.'s brief	I.G. Br. at (page)
Petitioner's response brief	P. Br. at (page)
I.G.'s supplemental brief	I.G. Supp. Br. at (page)
Petitioner's supplemental response brief	P. Supp. Br. at (page)
My Findings of Fact and Conclusions of Law	FFCL (number)

would not otherwise be included as part of the cost of projects under section 1110, shall be regarded as expenditures under the State plan or plans approved under Title XIX. Act, sections 1115(a)(1) and (2).

4. On October 1, 1992, the State of Arizona implemented the Arizona Health Care Cost Containment System (AHCCCS), a demonstration project approved under section 1115 of the Act. P. Ex. 3; I.G. Br. at 6; P. Br. at 2.

5. AHCCCS received a section 1115 waiver from the Secretary, which waived compliance with certain Title XIX requirements. See P. Ex. 1; FFCL 2.

6. The costs of the AHCCCS program which would not otherwise be included as expenditures under section 1903 of the Act, and which would not be included as part of the costs of projects under section 1110, shall, to the extent and for the period prescribed by the Secretary, be regarded as expenditures under Arizona's Title XIX State plan. Act, section 1115; FFCL 1-5.

7. AHCCCS contracts with providers for the provision of hospitalization and medical care coverage to members. Ariz. Rev. Stat. Ann. § 36-2903(A) (1993 and Supp. 1994).

8. A "prepaid capitated" payment system is one in which a health care provider is paid based on a fixed rate per member, notwithstanding the actual number of members who receive care from the provider and the amount of health care services provided to any member. Ariz. Rev. Stat. Ann. § 36-2901(9) (1993 and Supp. 1994).

9. AHCCCS operates on a prepaid capitated basis. Ariz. Rev. Stat. Ann. § 36-2904(A) (1993 and Supp. 1994).

10. The director of AHCCCS is authorized to apply for and accept federal funds available under Title XIX of the Act in support of AHCCCS; such funds may be used only to support persons who are defined as meeting Title XIX eligibility requirements. Ariz. Rev. Stat. Ann. § 36-2903.01(B)(5) (1993).

11. An AHCCCS contractor is required to comply with the provisions of federal law and regulations governing the Title XIX program, except for those requirements waived by the federal government for the State in the State Plan for Medical Assistance. A contractor is required also to comply with the provisions of Title 36, Chapter 29 of the Arizona Revised Statutes (governing AHCCCS), and with all applicable regulations promulgated by the Arizona Department of Health Services. I.G. Ex. 8 at 6.

12. Another section of the Arizona statutes mandates that the provisions relating to the operation of AHCCCS will be suspended if, at any time, federal funding under Title XIX is denied, not renewed or becomes unavailable. Ariz. Rev. Stat. Ann. § 36-2919 (1993).

13. The section 1115 waiver enables AHCCCS to receive Title XIX funds from the State as payments for services furnished under it.

14. Payments made to AHCCCS pursuant to section 1115(a)(2) are indisputably payments made under Title XIX, i.e., Medicaid payments. FFCL 9-13.

15. The AHCCCS program is a project approved under section 1115 of the Act. FFCL 5, 13.

16. The AHCCCS program is considered to be a State health care program within the meaning of section 1128(h)(1). FFCL 13-15.

17. Petitioner, an ophthalmologist, was one of three owners and principals of Health Care Providers of Arizona, Inc. (HCPA). I.G. Ex. 1 at 3-5; I.G. Ex. 10 at 2; P. Ex. 2.

18. HCPA was incorporated on August 6, 1982, to deliver health care to AHCCCS enrollees. I.G. Ex. 1 at 3-5; I.G. Ex. 7 at 3.

19. HCPA was a prime contractor with AHCCCS from 1982 to 1984. I.G. Ex. 1 at 3-5; P. Ex. 2.

20. AHCCCS paid HCPA monthly capitation payments for the delivery of health care to indigent Arizona citizens. I.G. Ex. 1 at 3-5.

21. The monthly contract payments made to HCPA were federal funds under Title XIX. FFCL 10, 14-19.

22. Between October 1, 1982 and September 30, 1984, HCPA's sole source of income was payments by AHCCCS and interest derived therefrom. I.G. Ex. 7.

23. AHCCCS checks paid to HCPA were deposited into HCPA's corporate checking account, which was controlled by HCPA's principals, one of whom was Petitioner. I.G. Ex. 1 at 4-5.

24. On or about July 28, 1989, a 17-count indictment was filed in the Superior Court of the State of Arizona

(State court) against Petitioner and the two other principals of HCPA. I.G. Ex. 7.

25. On April 6, 1992, Petitioner pled guilty to two counts of facilitation of theft, in violation of Ariz. Rev. Stat. §§ 13-1004 and 13-1802(A)(2). Pursuant to a plea agreement, these counts were amended and constitute amended counts 14 and 16 of the indictment. See I.G. Ex. 1.

26. By signing and dating the statements attached to his plea agreement, titled "Exhibit II, Factual Basis for Amended Count 14" and "Exhibit III, Factual Basis for Amended Count 16," Petitioner has admitted to the facts set forth in these statements. I.G. Ex. 1 at 4, 5.

27. The factual basis for amended count 14 states that Petitioner "aided [another principal's] theft of HCPA monies in violation of A.R.S. 13-1802(A)(2) by signing check number 2018 in the amount of $300.00 written on HCPA's checking account payable to Oximetrix, Inc." I.G. Ex. 1 at 4.

28. Petitioner signed check number 2018 to pay for an electric surgical knife, "knowing that the equipment was to be used for . . . non-AHCCCS cosmetic surgery patients. Cosmetic procedures are not covered by AHCCCS." I.G. Ex. 1 at 4.

29. The factual basis for amended count 16 states that Petitioner "aided in Berton Siegel's theft of HCPA monies by signing check #3748 in the amount of $10,000 written on Health Care Providers of Arizona checking account to Touche Ross Minneapolis." I.G. Ex. 1 at 5.

30. Check number 3748 was used to pay the balance on an actuarial study which was to provide information for a private health care organization owned by Berton Siegel and Petitioner. Petitioner signed the check knowing that the actuarial study was not used for HCPA's purposes. I.G. Ex. 1 at 5.

31. By signing checks on HCPA's checking account for the purchase of equipment for non-AHCCCS patients and for services from a non-AHCCCS organization, Petitioner misappropriated AHCCCS funds that had been entrusted to HCPA to pay for health care to indigent Arizona citizens who were enrolled in the AHCCCS program. FFCL 23-30.

32. Petitioner was a joint owner of Eyelites International, Inc. (Eyelites), an optical company. I.G. Ex. 1 at 3.

33. Via two subcontracts executed on or about August 9, 1983 and August 11, 1983, Eyelites became a HCPA subcontractor to provide eyeglasses to HCPA's AHCCCS members. I.G. Ex. 1 at 3; I.G. Ex. 7 at 13.

34. Neither Petitioner nor the other principal of Eyelites signed the subcontract; instead, two employees of the principals who had no association with Eyelites were directed to sign the Eyelites' subcontracts. I.G. Ex. 1 at 3.

35. AHCCCS regulations required HCPA's principals to disclose to AHCCCS any subcontracts in which a HCPA principal had a financial interest. I.G. Ex. 1 at 3.

36. On April 6, 1992, Petitioner pled guilty to one count of fraudulent schemes and practices, wilful concealment, in violation of Ariz. Rev. Stat. § 13-2311. Pursuant to a plea agreement, this count was amended and now constitutes amended count 10 of the indictment. See I.G. Ex. 1.

37. By signing and dating the statement attached to his plea agreement, titled "Exhibit I, Factual Basis for Amended Count 10," Petitioner has admitted to the facts set forth in this statement. I.G. Ex. 1 at 3.

38. The factual basis for amended count 10 states that Petitioner "knowingly concealed the related party status of Eyelite, International, Inc. pursuant to a scheme or artifice to defraud which enabled [Petitioner] to have HCPA pay $60,000.00 to Eyelites between November 14, 1983 and February 8, 1984 . . . while [Petitioner's] financial interest in Eyelites, International, Inc. remained concealed from AHCCCS." I.G. Ex. 1 at 3.

39. Petitioner knowingly concealed from AHCCCS that Petitioner, a HCPA principal, had a financial interest in Eyelites' subcontract. FFCL 32-38.

40. Under its subcontract, HCPA paid $60,000 to Eyelites between November 14, 1983 and February 8, 1984, for approximately 63 pairs of eyeglasses for HCPA's AHCCCS patients, with an average cost of approximately $952.38 per pair of glasses. I.G. Ex. 1 at 3.

41. Petitioner used Title XIX funds paid to HCPA by AHCCCS to pay Eyelites under the fraudulently obtained subcontract. Petitioner misappropriated Title XIX funds by directing such monies to Eyelites, a HCPA related party. I.G. Ex. 1 at 4. FFCL 32-40.

42. Petitioner caused AHCCCS funds to be used for private, non-Medicaid purposes. FFCL 25-41.

43. Based on Petitioner's guilty plea, the State court convicted Petitioner of two counts of facilitation of theft and one count of fraudulent schemes and practices and wilful concealment. I.G. Exs. 2, 3.

44. In accordance with the terms of Petitioner's plea agreement, the State court judge granted Petitioner's motion to dismiss counts 1-9, 11-13, 15, and 17 of the indictment. I.G. Ex. 3 at 4.

45. The State court placed Petitioner on three years probation, commencing July 31, 1992, and ordered him to pay restitution in the amount of $40,000. In addition, the court ordered Petitioner to pay $50,000 as reimbursement, a fine of $14,000, and other assessments and fees. I.G. Ex. 3.

46. As part of his plea agreement, Petitioner stipulated that he was "on notice that as a result of his plea he is subject to exclusion from Medicare and other State health care programs as a health care provider for a minimum period of at least five years." I.G. Ex. 1 at 6.

47. Under section 1128(i)(3) of the Act, "an individual or entity is considered to have been 'convicted' of a criminal offense -- (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State or local court. . . . "

48. Petitioner's guilty plea, and the actions taken by the State court indicating acceptance of his plea, constitute a "conviction" of Petitioner within the meaning of section 1128(i)(3) of the Act. FFCL 36; 43-47.

49. Petitioner was convicted of a criminal offense related to the delivery of an item or service under the Medicaid program, within the meaning of section 1128(a)(1) of the Act. FFCL 36-48.

50. Under section 1128(a)(1) of the Act, a conviction within the meaning of section 1128(i) mandates exclusion. The administrative law judge is not authorized to look behind the conviction to determine its validity.

51. The Secretary of HHS has delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21,662 (1983).

52. An exclusion imposed and directed pursuant to section 1128(a)(1) of the Act must be for a period of at least five years. Act, sections 1128(a)(1), 1128(c)(3)(B); 42 C.F.R. § 1001.102(a).

53. Section 1128 of the Act is intended to protect the integrity of federally-funded health care programs and the welfare of program beneficiaries and recipients from individuals and entities who have been shown to be untrustworthy. See S. Rep. No. 109, 100th Cong., 1st Sess. 1 (1987), reprinted in 1987 U.S.C.C.A.N. 682.

54. Neither the I.G. nor an administrative law judge is authorized to reduce the five-year minimum mandatory period of exclusion.

55. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for five years, as required by sections 1128(a)(1) and 1128(c)(3)(B) of the Act. FFCL 1-54.

PETITIONER'S ARGUMENT

Petitioner contends that because the AHCCCS program is a demonstration project approved under section 1115 of the Act, it is not a plan approved under Title XIX. Petitioner contends further that AHCCCS is not a State health care program within the meaning of section 1128(h) of the Act because it does not fulfill all Title XIX requirements. P. Br. at 8-13. Additionally, Petitioner argues that his offenses did not relate to the delivery of an item or service under Title XVIII or a State health care program. P. Br. at 12-21. He asserts that there is no nexus between his offenses and the delivery of an identifiable item or service. Moreover, Petitioner contends that the victim of his offenses was HCPA, not AHCCCS. P. Br. at 14-21. Furthermore, Petitioner alleges that the exclusion imposed against him by the I.G. has a punitive aspect. Petitioner contends that, based on the foregoing, he should not be subjected to a mandatory exclusion. P. Br. at 31-33.

BACKGROUND

Under section 1115 of the Act, a State's experimental, pilot, or demonstration project which, in the Secretary's judgment, is likely to promote the objectives of Title XIX, may receive a waiver from the Secretary from compliance with any requirements of section 1902 of Title XIX to the extent necessary to enable the State to carry

out its project. If the Secretary grants a section 1115 waiver, the costs of the State's project, which would not otherwise be included as expenditures under section 1903, shall be regarded as expenditures under the State plan or plans approved under Title XIX. Act, sections 1115(a)(1) and (2).[4]

The legislative history of section 1115 states in part:

> The public assistance titles of the Social Security Act contain a number of requirements on the States for the approval of a State plan. These plan requirements, however, often stand in the way of experimental projects designed to test out new ideas and ways of dealing with the problems of public welfare recipients. One such requirement, for example, is that the plan be in effect throughout the State. A demonstration project usually cannot be statewide in operation. For this reason, under the bill the Secretary would be authorized to waive plan requirements to the extent he believes this action is necessary to carry out a demonstration or experimental project, if such project furthers the general objectives of the program. This would mean that the regular Federal participation would be available for such projects whether they involve assistance, service, or administrative expenditures.

S. Rep. No. 1589, 87th Cong., 2nd Sess. (1962), reprinted in 1962 U.S. Code Cong. & Admin. News 1943.

Congress thus intended that a project which received a section 1115 waiver would still be able to receive federal funds under a public assistance title. Thus, the effect of section 1115 is to enable a State to carry out a demonstration project and receive Title XIX federal funds.

Section 1115(a)(1) provides that the Secretary may waive compliance with section 1902 requirements "to the extent . . . necessary." The section 1115 waiver, therefore, gives states the flexibility to deviate from the requirements of section 1902 of the Act, which contains various State plan requirements for reimbursement under

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[4] The statutory language of section 1115(a)(1) and (2) refers to other titles and sections of the Act; however, for purposes of relevancy to this decision, I refer only to Title XIX and sections 1902 and 1903.

the Medicaid program. The section 1115 waiver provides Title XIX funding for costs which would otherwise be considered non-matchable expenditures under section 1903 of the Act. These are costs which would normally not receive federal funds; however, since they have been approved under the section 1115 waiver, they are regarded as Title XIX expenditures.

DISCUSSION

I. A project approved under section 1115 of the Act is regarded as a State health care plan approved under Title XIX, within the meaning of section 1128(h)(1) of the Act.

On October 1, 1982, the State of Arizona implemented AHCCCS, a demonstration project approved under section 1115 of the Social Security Act. Pursuant to the Arizona statute, AHCCCS contracts to provide hospital and medical care coverage to its members, who are indigent Arizona citizens. Ariz. Rev. Stat. Ann. § 36-2903(A) (1993 and Supp. 1994). HCPA, a company in which Petitioner was one of three owners and principals, was incorporated on August 6, 1982, to deliver health care to AHCCCS enrollees. HCPA was a prime contractor with AHCCCS from 1982 to 1984. In accordance with its contract, AHCCCS made monthly payments to HCPA to cover the cost of providing services to indigent Arizona patients. The payment AHCCCS made to HCPA was made on a prepaid capitated basis (Ariz. Rev. Stat. Ann. §36-2904(A) (1993 and Supp. 1994)), in which the amount of the payment, in any given month, was based on the number of patients enrolled with HCPA during that month.[5] P. Br. at 17-18.

The I.G. does not dispute Petitioner's assertion that AHCCCS was approved under section 1115, and that it was not required to comply with certain Title XIX requirements. Petitioner argues, however, that AHCCCS cannot be a State health care program within the meaning of section 1128(h)(1) of the Act because it does not fulfill all Title XIX requirements. P. Br. at 8-13. Petitioner's argument, however, does not have any merit.

Based on the evidence in the record, I conclude that Arizona has in existence a State plan approved under

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[5] This payment plan varies from the more common fee-for-service arrangement.

Title XIX.[6] I.G. Exs. 12 and 13. The AHCCCS program thus operates under this State plan.[7] Pursuant to section 1115 of the Act, AHCCCS' costs which would not otherwise be included as section 1903 expenditures ". . . shall . . . be regarded as expenditures under the State plan . . . approved under such title." Thus, under AHCCCS, expenditures which would normally not be allowable under section 1903 are regarded as expenditures under Arizona's Title XIX plan. The section 1115 waiver enables AHCCCS to receive Title XIX federal funds from the State as payments for services furnished under it. It is indisputable, therefore, that payments made to AHCCCS pursuant to section 1115(a)(2) are Title XIX, i.e., Medicaid payments. This means that the monthly payments which HCPA received under the AHCCCS program are Medicaid payments.

The director of AHCCCS is authorized to apply for and accept federal financing through Title XIX of the Act. Ariz. Rev. Stat. Ann. § 36-2903.01(B)(5) (1993). Such funds may be used only to support persons who are defined as meeting Title XIX eligibility requirements. Ariz. Rev. Stat. Ann. § 36-2903.01(B)(5) (1993). Accordingly, a contractor with AHCCCS is required to comply with the provisions of federal law and regulations governing the Title XIX program, except for those requirements that have been specifically waived for the State in the State Plan for Medical Assistance. I.G. Ex. 8 at 6. Arizona State law mandates also that provisions relating to AHCCCS operations will be suspended if Title XIX funding is at any time denied, not renewed, or made unavailable. Ariz. Rev. Stat. Ann. § 36-2919 (1993).

Based on the foregoing, I find that although the AHCCCS program is a project approved under section 1115 of the Act, it is considered to be a State health care program within the meaning of section 1128(h)(1). Payments made under the section 1115 waiver are still Medicaid payments. The fact that payments received by HCPA from AHCCCS were made pursuant to a waiver of certain Title XIX requirements does not change that the source of funds

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[6] The Arizona Department of Health Services was the State agency designated to administer or supervise the administration of the Medicaid program under Title XIX of the Act. I.G. Ex. 12 at 10, 14.

[7] The fact that the I.G. may not have submitted the plans in their entirety does not detract from the fact that a State plan approved under Title XIX is, in fact, in existence in Arizona.

is the Medicaid program. Although the Secretary may have waived compliance with certain Title XIX requirements, payments to the program are made from Title XIX funds.[8] I find, therefore, that the funds which Petitioner misappropriated from the AHCCCS program (as discussed below) were Medicaid funds paid to AHCCCS pursuant to Arizona's State plan and its section 1115 waiver.

II. Petitioner was "convicted" of a criminal offense, within the meaning of section 1128(a)(1) of the Act.

An individual or entity must be excluded from participation in the Medicare and Medicaid programs pursuant to section 1128(a)(1) where two elements are present: (1) the individual or entity has been "convicted" of a criminal offense, within the meaning of section 1128(i); and (2) the conviction is related to the delivery of an item or service under the Medicare or Medicaid programs.

With regard to the first element, as stated earlier, Petitioner pled guilty to one count of fraudulent schemes and practices, wilful concealment and two counts of facilitation of theft. Based on Petitioner's guilty plea, the State court convicted him of these offenses. The court placed Petitioner on three years' probation, commencing July 31, 1992, and ordered him to pay restitution in the amount of $40,000. I.G. Ex. 3 at 3. In addition, the court ordered Petitioner to pay $50,000 as reimbursement, a fine of $14,000, and other assessments and fees. I.G. Ex. 3 at 4. Under section 1128(i)(3), "an individual or entity is considered to have been 'convicted' of a criminal offense -- (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State or local court . . . ." Thus, Petitioner's guilty plea, and the court's acceptance of that plea, constitute a "conviction" of Petitioner within the meaning of section 1128(i)(3) of the Act.

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[8] In fact, Petitioner's disavowal of AHCCCS as a State health care program within the meaning of Section 1128(h)(1) is rather disingenuous in light of the statement in one of its exhibits that "AHCCCS was then, and remains today, the only statewide prepaid Medicaid system in the country." P. Ex. 3 at 5.

III. Petitioner's criminal conviction is related to the delivery of an item or service under the Medicaid program, within the meaning of section 1128(a)(1) of the Act.

As for the second element under section 1128(a)(1), I find that the criminal offense of which Petitioner was convicted is "program-related."

A. Petitioner's conviction of fraudulent schemes and practices, wilful concealment is related to the delivery of an item or service under the Medicaid program.

On April 6, 1992, Petitioner pled guilty to one count of fraudulent schemes and practices, wilful concealment, in violation of Ariz. Rev. Stat. § 13-2311, and two counts of facilitation of theft, in violation of Ariz. Rev. Stat. §§ 13-1004 and 13-1802(A)(2). These counts were amended counts 10, 14, and 16, respectively, of the original indictment. Petitioner signed and dated factual statements which underlie the basis for these counts, thereby admitting to the facts set forth in these statements.

Based on the factual basis for amended count 10 signed by Petitioner, his conviction for fraudulent schemes and practices, wilful concealment arose from Petitioner's principal interest in Eyelites International, Inc. (Eyelites). I.G. Ex. 1 at 3. Petitioner was a co-owner of Eyelites, and through this privately-held corporation, he subcontracted with HCPA to provide eyeglasses to HCPA's AHCCCS members. AHCCCS regulations required HCPA principals to disclose to AHCCCS any HCPA related party subcontracts in which a HCPA principal had a financial interest. I.G. Ex. 1 at 3. Petitioner knowingly concealed his related party status in Eyelites, and his financial interest in the subcontract was not immediately discovered, because neither Petitioner nor the other principals of Eyelites signed the subcontract. I.G. Ex. 1 at 3. Two employees of the principals, who had no association with Eyelites, were directed to sign the Eyelites' subcontracts. Under the subcontract, HCPA paid $60,000 to Eyelites between November 14, 1983 and February 8, 1984 for approximately 63 pairs of eyeglasses for HCPA's AHCCCS patients, with an average cost of approximately $952.38 per pair of glasses. Id.

Petitioner argues that his failure to disclose an ownership interest in Eyelites does not relate to the delivery of an item or service under the Medicaid program since it does not relate to any request for payments from

AHCCCS. Petitioner contends that it was an unintentional oversight. P. Br. at 15.

A criminal offense will be found to be program-related when there exists a "common sense connection" between the criminal offense and the delivery of items or services under the Medicare or Medicaid programs. Richard F. Jaskiewicz, R.N., DAB CR315 (1994), Berton Siegel, D.O., DAB 1467 (1994). In addition, 42 C.F.R. § 1001.101(a) provides also that an offense will be program-related if it concerns "the performance of management or administrative services relating to the delivery of items or services under any such program." 42 C.F.R. § 1001.101(a) (1994). Here, Petitioner, through HCPA's subcontract with Eyelites, was submitting claims for eyewear services for HCPA's AHCCCS patients. Petitioner, therefore, used Title XIX funds, paid to HCPA by AHCCCS, to pay Eyelites (and himself) under the fraudulently obtained subcontract. Petitioner's misappropriation of federal funds to his own privately held corporation is the common sense connection between Petitioner's failure to disclose and the unlawful use of federal funds.

B. Petitioner's convictions of facilitation of theft are related to the delivery of an item or service under the Medicaid program.

Petitioner was convicted of two counts of facilitation of theft. Both offenses concerned the use of Medicaid funds for private purposes.

AHCCCS checks paid to HCPA were deposited into HCPA's corporate checking account, which was controlled by HCPA's principals, one of which was Petitioner. Petitioner signed a $300 check on HCPA's checking account for the purchase of electrical surgical knife equipment, knowing that the equipment was to be used for non-AHCCCS cosmetic surgery patients. I.G. Ex. 1 at 4. The wilful nature of this offense was further illustrated by the fact that AHCCCS does not cover cosmetic procedures. Petitioner also signed a $10,000 check on HCPA's checking account to Touche Ross, Inc. to pay the balance of an actuarial study commissioned for a private health care services organization of which Petitioner is a co-owner. Petitioner signed the $10,000 check despite knowing that the actuarial study was used for his health care organization and not for HCPA.

Petitioner argues that these checks do not relate to the delivery of items or services under the Medicaid program, since AHCCCS payments are not paid on a fee for service basis, but on a capitated basis, regardless of whether

any items or services are rendered. P. Br at 13-15. Petitioner argues also that his criminal offenses are not program-related since AHCCCS was not harmed by his misconduct. According to Petitioner, HCPA, and not AHCCCS, was the victim of his crimes since the federal funds at issue were directly paid in trust to HCPA.

Petitioner's arguments, however, are without any merit. By signing checks on HCPA's checking account for the purchase of equipment for non-AHCCCS patients and for services for a non-AHCCCS organization, Petitioner caused AHCCCS funds to be used for private, non-Medicaid purposes. Thus, Petitioner misappropriated AHCCCS funds that had been entrusted to HCPA to pay for health care to indigent Arizona citizens enrolled in the AHCCCS program. Under its contract with AHCCCS, HCPA's primary purpose was to provide health care services to AHCCCS enrollees regardless of how payment was rendered. Petitioner's misconduct directly diminished the ability of programs funded by Title XIX to provide health care services to its recipients by reducing the funds available to pay for these services. Thus, AHCCCS, and not HCPA, was the victim of Petitioner's crimes.

Petitioner's financial misconduct, and his depletion of funds necessary for the delivery of health care to AHCCCS enrollees, sufficiently establishes that Petitioner's convictions for facilitation of theft are related to the delivery of an item or service under the Medicaid program. Berton Siegel, D.O., DAB 1467 (1994). Furthermore, a criminal offense is considered to be "program-related" where either the Medicare or Medicaid program is the victim of the crime. Napoleon S. Maminta, M.D., DAB 1135 (1990).

IV. Petitioner's mandatory five-year exclusion is remedial, and not punitive, in nature.

Petitioner argues that the five-year exclusion imposed upon him has a punitive effect in that he would be unable to "submit[ ] true and correct bills in the future for services that his patients need and require." Petitioner's Request for Hearing at 3. Petitioner contends that any remedial effect of the exclusion is sufficiently accomplished by the fact that Petitioner is no longer in Arizona and will not be a prime contractor under AHCCCS. In addition, Petitioner argues that the five-year exclusion which has been imposed against him is unduly harsh since the I.G. has not proven the existence of aggravating circumstances.

I find that Petitioner's arguments are without merit. Section 1128 is a civil statute, and, in a prior decision of an appellate panel of the Departmental Appeals Board, the panel stated that exclusions are not punitive actions. The panel stated that exclusions are administrative remedies designed to protect federally-funded health care programs:

> [T]he purpose of the exclusion here is to protect federally funded health programs, not to punish Petitioner. Both the State . . . and the federal government have an interest in protecting such programs from untrustworthy individuals.

Paul R. Scollo, D.P.M., DAB 1498 (1994), quoting Larry White, R.Ph., DAB 1346, at 3 (1992).

Congress intended section 1128 to be remedial in application. The legislative history behind section 1128 supports that the purpose of the exclusion law is to protect the integrity of federally financed health care programs and the welfare of the programs' beneficiaries and recipients. The exclusion law is intended to protect program funds and beneficiaries and recipients from providers who have demonstrated by their conduct that they pose a threat to the integrity of such funds, or to the well-being and safety of beneficiaries and recipients. See S. Rep. No. 109, 100th Cong., 1st Sess. 1 (1987), reprinted in 1987 U.S.C.C.A.N. 682. Thus, Petitioner's argument that his exclusion is punitive in nature is without any merit.

Furthermore, an exclusion imposed and directed pursuant to section 1128(a)(1) of the Act must be for a period of at least five years.[9] This means that in the case of a mandatory exclusion, the I.G. is not required to prove the existence of aggravating factors.

CONCLUSION

I find that the AHCCCS program is considered to be a "State plan," within the meaning of section 1128(h) of the Act. Accordingly, Petitioner's convictions are related to the delivery of an item or service under the

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[9] By the very terms of his plea agreement, Petitioner was placed on notice that, as a result of his plea, he was subject to exclusion from Medicare and Medicaid for at least five years. I.G. Ex. 1 at 6.

Medicaid program. Petitioner's offenses involved the misappropriation of federal funds, and his crimes directly diminished the Medicaid program's ability to provide health care services to its recipients, by reducing the funds available to pay for these services.

Accordingly, Petitioner's exclusion from the Medicare and Medicaid programs, for at least five years, is mandated by sections 1128(a)(1) and 1128(c)(3)(B) of the Act. Neither the I.G. nor an administrative law judge is authorized to reduce the five-year minimum mandatory period of exclusion. Jack W. Greene, DAB CR19, aff'd, DAB 1078 (1989), aff'd sub nom., Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990).

The five-year exclusion is, therefore, sustained.

/s/

Joseph K. Riotto
Administrative Law Judge